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6 April 1972

MEMORANDUM FOR THE RECORD

SUBJECT: Executive Agreements

1. Yesterday, Senator Case introduced a bill (S. 3447) which would terminate certain assistance to Portugal and Bahrain until the military base agreements are submitted to the Senate for its advice and consent. As Case explained, while the Senate cannot compel the Executive to submit executive agreements to the Senate for its advice and consent, the Congress can refuse to provide money to pay for the agreement's cost.

2. Although the Senate has passed a sense of Senate resolution, also sponsored by Case, that the Portugal/Bahrain agreements should be submitted to the Senate as treaties, the Department of State has maintained that the agreements were appropriately concluded as executive agreements. However, State has committed itself "to make every effort to keep the appropriate Congressional Committees informed of important agreements under negotiation and to consult with those Committees whenever there is a serious question whether an international agreement is to be made in the form of a treaty or otherwise." (State has provided Case with the text of both agreements.) Case, for his part, contends that the stationing of American troops overseas should be subject to the treaty process because it could lead to a commitment which could draw this country into war.

3. Observations:

a. The battle over executive agreements and international agreements at this stage involves the policymakers and is one in which we should not be engaged. So far the battle has been fought over relatively undefined terms; i. e., "international agreement" or "executive agreement." A more explicit and constructive statement of interest has emerged, however, in the exchange between State and Case. This narrower interest appears to revolve around "national commitment."

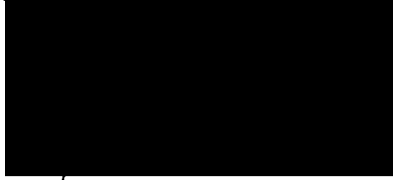
b. "National commitment" could be defined as "a promise to a foreign government to use armed forces in hostilities," (a somewhat broader version would extend to the use of U. S. financial resources). Such national commitments could either be: (1) subject to the treaty process or, (2) if the immediate public disclosure would, in the opinion of the President, be

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prejudicial to the national security, transmitted to the foreign affairs committees of both Houses under an appropriate injunction of secrecy to be removed only upon due notice from the President. Such an arrangement between the Executive and the Congress would appear to satisfy the legitimate interest of both parties without subordinating the constitutional responsibilities of either, and would, of course, eliminate any problems for the intelligence community as suggested by the Case bill (S. 596) and Senator Ervin's Separation of Powers Subcommittee's inquiry on the subject of executive agreements.

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Assistant Legislative Counsel

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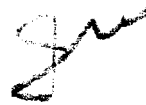
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OLC/LLM:smg (7 Apr 72)

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NOTE FOR: JMM

A handwritten signature in dark ink, appearing to be 'JMM' with a stylized flourish.

This is a timely topic and if you feel that it has some value, you might input it at a LIG meeting if and when this subject is discussed.

LLM